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NO. ~~335~~ 38

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1922.

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WYOMING RAILWAY COMPANY,
*Appellant.*

*vs.*

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
*Appellees.*

Appeal from the District Court of the United States for the District of Wyoming.

## BRIEF AND ARGUMENT FOR APPELLANT.

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## BRIEF AND ARGUMENT FOR APPELLANT.

### I.

### STATEMENT OF THE CASE.

The Wyoming Railway Company, appellant herein, filed its bill of complaint on its own behalf and on behalf of other carriers affected by the order of Interstate Commerce Commission, seeking to suspend and set aside the order of the Interstate Commerce Commission of November 3, 1921, in its Docket No. 11608, 64 ICC 485 (Rec. 1, 2, 17). The United States, appellee, filed a motion to dismiss the complaint for want of equity (Rec. 21). The Interstate Commerce Commission intervened (Rec. 21) and filed a formal answer (Rec. 22). Thereafter, on January 21, 1922, after hearing before Circuit Judge Lewis and District Judges Ryner and Kennedy, an order

was entered denying the application for a preliminary injunction and dismissing the bill without prejudice (Rec. 24, 25). The appeal is from that order.

The bill of complaint in substance makes the following allegations. The appellant is a common carrier engaged in the transportation of freight by railroad in interstate commerce (Rec. 2). It is a short line railroad, independently owned and operated, extending 28.6 miles from Clearmont, Wyoming, to Buffalo, Wyoming. Clearmont is its junction point with the Chicago, Burlington & Quincy Railroad Company (hereinafter called the Burlington). Ucross, Wyoming, is a station on appellant's line ten miles from Clearmont. Buffalo and Ucross are not served by any other railroad (Rec. 4). Appellant's line of railroad was not completed until 1918. It has been operated at a loss, the operating deficit in 1918 being $46,408.72 and in 1919 $24,917.80 (Rec. 4, 176); no interest has been paid on its bonds for nearly three years; no dividends have ever been paid on the stock; its officers and directors have received no salaries; it operates through a sparsely settled country with no present prospect of increased traffic; it hauls over severe grades as Buffalo is nearly 1,000 feet higher than Clearmont (Rec. 4). Appellant made a freight rate on lumber from points in Idaho and other states to stations on its line by applying the rate applicable from point of origin to Clearmont, which is the junction point with the Burlington, and adding thereto its lawful published rates (or local) (Rec. 4). In 1920 Pioneer Lumber Company and Buffalo Lumber Company, engaged in the retail lumber business at Buffalo, filed a complaint with the Interstate Commerce Commission alleging that the rates charged by appellant and connecting carriers on interstate lumber shipments from other states to Buffalo and Ucross and on brick in carload lots from Sheridan, Wyoming to Buf-

falo were unreasonable, unjustly discriminatory and unduly prejudicial and asked for reparation and the establishment of lower interstate rates on lumber (Rec. 2, 38). Appellant and other defendant carriers therein answered and, after a hearing, the Commission made its report by Division 4 consisting of Commissioners Mayer, Daniels and Esch. (Rec. 3, 13, 64 ICC485.) In its report and order the Commission found that no evidence was offered in support of unjust discrimination and that the interstate rates on lumber and lumber products were not unreasonable, or otherwise unlawful, but that the failure of the appellant and connecting carriers to extend the blanket rates on lumber applicable to points on the Burlington to Buffalo and Ucross, while at the same time maintaining the blanket rates to other more distant points in the blanket territory on the main line and branch lines of the Burlington or on independent connecting lines, is and for the future will be unduly prejudicial. (Rec. 3, 13, 17). By this order of November 3, 1921, appellant and connecting carriers, defendants therein, are required to establish, maintain and apply to the transportation of lumber and lumber products from points in Idaho, Montana and Washington, to Buffalo and Ucross, Wyoming, rates which do not exceed the rates contemporaneously maintained from the same points to Clearmont and Sheridan, Wyoming, and other points in the blanket territory on the line of the Burlington and independent connecting lines other than appellant. (Rec. 3, 4, 17). The Commission in its report admitted the existence of all the facts alleged in the bill. (Rec. 5.) This order is on the theory that all shippers and localities in the blanket territory are entitled to the blanket rates regardless of the finding of fact that the existing combination rates are not unjust, or unreasonable, or unjustly discriminatory. (Rec. 6.) Appellant does not participate in the transportation of lumber from Idaho, Mon-

tana and Washington to Clearmont, or any point on the lien of the Burlington within the blanket rate territory and has no power or authority to dictate what the rate shall be from producing points to points on said line. (Rec. 6.)

The bill then makes further allegations. The order of the Commission deprives appellant of its property without due process of law in violation of the Fifth Amendment. Appellant is operating at a loss and the present rates on lumber are not unreasonable, or unjustly discriminatory so that a reduction in rates will be confiscatory. No agreement has been made, or can be made with the Burlington and other trunk lines for a division of joint rates on lumber which will yield appellant sufficient to pay the cost of its service or a rate equal to the present local rate (Rec. 6). Appellant declines to permit other carriers to extend the blanket rates to points on its line as the service which it performs justifies higher rates to points on its line than to points on lines of other carriers. (Rec. 7.) The rate in question does not discriminate against either persons or localities; there is no competition between retail lumber dealers situate considerable distance apart in the territory involved. Appellant cannot be jointly or severally held responsible for any undue prejudice in connection with rates on lumber to points on lines of other carriers where it does not participate in the transportation. Irreparable damage will accrue from the enforcement of said order of the Commission for the reason that appellant will be required and compelled to transport lumber at rates which are lower than its present rates. (Rec. 9.) The order is in excess of the powers of the Commission. The Commission has applied erroneous rules of law in the proceedings and the order is arbitrary and void.

The bill prays that the order of the Commission be suspended and set aside. (Rec. 12.)

The report of the Commission (64 ICC 485, Rec. 13) states in part:

"Complainants, the Pioneer Lumber Company and the Buffalo Lumber Company are corporations engaged in the lumber and fuel business at Buffalo, Wyo. By complaint filed July 7, 1920, they allege that the rates charged since June 25, 1918, on interstate carload shipments of lumber and lumber products from points in Idaho, Montana, and Washington, to Buffalo and Ucross, Wyo., and on intrastate shipments of brick, in carloads, from Sheridan, Wyo., to Buffalo were unreasonable, unjustly discriminatory and unduly prejudicial. The prayer is for reparation and the establishment of interstate rates on lumber for the future. No evidence was offered in support of the allegation of unjust discrimination. Rates will be stated in amounts per 100 pounds.

Buffalo, with a population of 1,800, is the terminus of the Wyoming Railway, 28.6 miles southwest of Clearmont, Wyoming, the junction with the Chicago, Burlington & Quincy, hereinafter called the Burlington. Ucross, with a population of about 100, is also on the Wyoming ten miles southwest of Clearmont. The Wyoming was organized in 1910, but construction was not completed until 1918.

The shipments moved over defendants' lines and apparently the applicable rates were collected upon the Clearmont combination.

* * *

"The rates on lumber and lumber products in the northwest have, for many years, been blanketed both as to points of origin and destination. In the so-called *Northwest Lumber Cases* 14 I. C. C. 1, 23, 41, 51, decided June 2, 1908, we prescribed reasonable rates to Clearmont which is embraced in the so-called blanket territory. The components to Clearmont on lumber and lumber products here in issue are the rates thus prescribed increased under the general increases of 1918 and 1920.

* * *

The present coast-group rate is 81.5 cents and the present Spokane rate is 72.5 cents. The factors

up to Clearmont are 56.5 and 47.5 cents, respectively. Complainants submitted exhibits which showed the ton-mile and car-mile earnings on shipments of lumber. These earnings were compared with earnings that would have accrued if the shipments had moved to other destinations in the blanket territory which took the same rates as Clearmont. For example, a shipment of fir lumber from National, Washington, to Buffalo, 1,270 miles, earned 10.2 mills per ton-mile and under the present rates it would earn 12.8 mills. If this shipment had moved to Spearfish, South Dakota, 1,556 miles, it would have produced 5.7 mills per ton-mile and would now produce 7.2 mills. The rates to Birds, Colorado, 1,676 miles, on this shipment would have yielded 5.3 mills and 6.7 mills, respectively. The factor up to Clearmont on this shipment yielded 7.2 mills and the factor from Clearmont to Buffalo, 14.03 cents per ton-mile. The present 81.5-cent rate from Everett, Washington, to Buffalo, 1,128 miles, based on a load of 63,760 pounds, the average load of fir lumber as given in Increased Rates, 1920, 58 I. C. C. 220, by the West Coast Lumbermen's Association, yields car-mile earnings of 46.06 cents, while the present Everett-Clearmont rate of 56.5 cents produces car-mile earnings of 32.77 cents. If the Clearmont rate were extended to Buffalo, the car-mile earnings would be 31.93 cents. The rate from Everett to Birds yields car-mile revenue of 21.45 cents.

Defendants maintain that these comparisons are of little value because blanket rates are compared with blanket rates and the specific earnings vary with the distances used. They contend that the average point of origin and the average point of destination in the respective blankets should be considered, and that as the factors up to Clearmont were prescribed by us in 1908, and subsequently increased under General Order No. 28 and the general increase of 1920, they are in and of themselves reasonable.

It appears that the Wyoming incurred in 1918 an operating deficit of $46,408.72 and $24,917.89 in 1919; no interest has been paid on its bonds for nearly three years; no dividends have ever been paid on its stock; its officers and directors have received no salaries. Its line is only 28.6 miles in length and

Buffalo is nearly 1,000 feet higher than Clearmont The road is operated through a sparsely settled country with no present prospect of increased traffic.

The above facts point to the conclusion that neither the combination rates nor the components thereof were or are unreasonable *per se*. The question remains as to whether the rates resulted in undue prejudice.

The Pioneer Lumber Company has lumber yards at Sheridan, 38 miles north of Buffalo by dirt road, and at Ucross as well as at Buffalo, while the Buffalo Lumber Company has yards at Buffalo and at Kaycee, Wyoming, about 60 miles south of Buffalo. The testimony shows that farmers within eight miles north of Buffalo generally buy their lumber in Buffalo, but those farther north buy at Sheridan. There is a divide known as Tunnell Hill about midway between Sheridan and Buffalo, and save for the more favorable freight rates to Sheridan the record indicates that Buffalo would probably receive the business of those who live south of the divide. Ulm, Wyoming, is on the Burlington just west of Clearmont. Competitors, of the Pioneer Lumber Company located at Ulm and Clearmont are enabled by reason of their lower rates to secure trade which otherwise might go to Ucross. Casper, Wyoming, is on the Big Horn division of the Burlington about 135 miles south of Buffalo and 75 miles south of Kaycee, and takes the blanket rate. The Buffalo Lumber Company's yard at Kaycee is not served by railroad and is approximately halfway across country, between Buffalo and Casper. The complainant hauls its lumber from Buffalo to Kaycee by truck. Just prior to the hearing oil was discovered about ten miles south of Kaycee, and the Buffalo Lumber Company insists that the blanket rate should be extended to Buffalo in order that it may use its yards at that point and haul lumber to Kaycee so that it may be able to compete in the oil field with its Casper competitors.

Spearfish and Deadwood, South Dakota, are located on the branch line of the Burlington that connects with the main line at Edgemont, South Dakota. Edgemont is 124.4 miles distant from Clearmont, and Spearfish and Deadwood are 130 and 107 miles

distant, respectively, from Edgemont. Both Spearfish and Deadwood have the blanket rates. Birds, Colorado, about 400 miles beyond Clearmont, and located upon the Great Western, an independent line 82 miles long, takes the blanket rates. Complainants contend that the fact that the defendants voluntarily apply the blanket rates to these points, and the further fact that defendants willingly maintain the extensive blanket, while refusing to extend blanket rates to points on the Wyoming result in undue prejudice.

Defendants state that they extend blanket rates to points on independent short lines only when compelled to do so by competition. The Burlington extends the blanket rate from a point about 70 miles south of Billings, Montana, for a distance of about 600 miles through Alliance, Nebraska, to Denver, Colorado. This blanket was originally established to meet competition on lumber from California via the Harriman lines. At that time the Big Horn division of the Burlington had not been completed and to compete with the Union Pacific at Denver, the Burlington had to haul lumber received from the Great Northern and the Northern Pacific via its Sheridan route through Alliance. If the former rate had not been blanketed, fourth section violations would have been created along the Sheridan line. This would not account for the Burlington's extending the blanket to Spearfish, an additional haul from Edgemont of 130 miles. Competitive reasons compelled the extension of the blanket rates to Birds. The Great Western has two connections with the Union Pacific, one at Eaton, Colorado, and one at Kelim, Colorado; two connections with the Colorado & Southern, one at Loveland, Colorado, and one at Windsor, Colorado, besides the connection with the Burlington at Longmont, Colorado. Defendants contend that this competition distinguishes the situations at Birds and at Buffalo. But there is no such carrier competition at local main line and branch line stations on the Burlington in this blanket territory.

Since the trunk line carrier publishes the same blanket rate on lumber in carloads to destinations located over a considerable stretch of its main line

and also extends that rate to points located on its branch lines a shipper situated on an independent branch line connecting with this blanketed stretch of the main line is entitled to the blanket rate, especially where the service over the independent branch line is not in excess of the average service over the trunk line's own branches. It may be cheaper to perform a given service for equal distances to points located on a trunk line or on its branch lines than to points on an independent line. It is not cheaper for the Burlington to perform the service from Edgemont to Spearfish than for the Wyoming Company to perform the service from Clearmont to Buffalo. The mileage from Edgemont to Spearfish is over 4.5 times greater than that to Buffalo. Buffalo and Ucross are entitled to the blanket rates.

"The question of divisions, and whether or not the Wyoming should receive its full local or only part thereof out of the blanket rate is not here in issue.

There is no competition between retail lumber dealers situated at considerable distances apart in this extensive blanket territory. The inhibition of Section 3 of the Interstate Commerce Act against undue prejudice applies to localities as well as to shippers at those localities. As was said in *Intermediate Rate Asso.* v. *Director General,* 61 I. C. C. 226, at page 233, respecting competition between localities:

Thriving communities, all in the same general section of the country, striving for population, industry and business growth, may not need elaborate evidence to show that they are entitled to relief if the rates are not properly related.

We find that the interstate rates assailed on lumber and lumber products were not and are not unreasonable; that during the period of Federal control the intrastate rates on brick here in issue were not unreasonable, or otherwise unlawful; but that the failure of defendants to extend the blanket rates on lumber to Buffalo and Ucross on the line of the Wyomnig Railway, while at the same time maintaining the blanket rates to other more distant points in the blanket territory on defendants' main and branch lines or on independent connecting lines, is and for

the future will be unduly prejudicial. Complainants have not shown that they were damaged by any undue prejudice which may have existed in the past. Reparation is therefore denied."

The material parts of the order of the Commission (Rec. 17) are:

"It is ordered, that the above named defendants, according as they participate in the transportation, be, and they are hereby, notified anad required to cease and desist, on or before February 24, 1922, and thereafter to abstain, from publishing, demanding, or collecting for the transportation of lumber and lumber products, in carloads, from points in Idaho, Montana, and Washington to Buffalo and Ucross, Wyo., rates which exceed the rates made on the basis prescribed in the next succeeding paragraph hereof.

It is further ordered, that said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before February 24, 1922, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in Section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the transportation of lumber and lumber products from points in Idaho, Montana and Washington to Buffalo and Ucross, Wyoming, rates which do not exceed the rates contemporaneously maintained by them on lumber and lumber products from the same points to Clearmont and Sheridan, Wyoming, and other points in the blanket territory on defendants' lines and independent connecting lines."

This is the order which is sought to be enjoined.

## II.

## SPECIFICATION OF ERRORS.

1. The District Court erred in overruling and denying the application of complainant (appellant) for a preliminary injunction, as prayed for in its bill of complaint.

2. The District Court erred in sustaining and granting the motion of the defendant, the United States (appellee), to dismiss the bill of complaint.

3. The District Court erred in dismissing the complainant's (appellant's) bill of complaint and entering a judgment in favor of the defendant (appellee) and against the complainant (appellant) for costs of suit.

The assignment of errors appears in the record at page 28. It is the contention of appellant that the bill of complaint sets forth a good cause of action, and, therefore, the District Court erred in denying the application for a preliminary injunction, in dismissing the bill and in entering a judgment in favor of the defendant.

## ARGUMENT.

### I.

**The Courts have jurisdiction and power to set aside by injunction an order of the Interstate Commerce Commission when the order exceeds its statutory powers.**

This principle has been announced in many cases and will not be controverted. As was said in the case of *Skinner & Eddy* v. *U. S.*, 249 U. S. 557, at page 562:

> "The contention is that the Commission has exceeded its statutory powers; and, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order.* * *"

The same rule of law is adopted in the following cases:

*Louisiana & P. R. Co.* v. *U. S.*, 209 Fed. 244.

*Central R. Co. of N. J.* v. *U. S.* 257 U. S., Dec. 5, 1921, 66 L. Ed. 91.

*Interstate Commerce Com.* v. *Diffenbaugh*, 222 U. S. 42.

### II.

**The order questioned in this case exceeds the power granted to the Interstate Commerce Commission by Sec. 3 of the Interstate Commerce Act or any other power of the Commission.**

In view of the finding of the Commission that the rates on lumber and lumber products were not and are not unreasonable, and that no evidence was offered of unjust discrimination, no question arises under Section 1 or Section 2 of the Interstate Commerce Act.

The question is, then, whether the finding of the Commission that these rates are and for the future will be unduly prejudicial and the order on this finding that the Wyoming Railway Company, the appellant, and the other carriers participating in the shipments of lumber and lumber products from the west coast group and the Spokane group to Buffalo and Ucross, Wyoming, cease and desist from maintaining rates which exceed the blanket rates for this territory and for the future maintain and apply to Buffalo and Ucross on the Wyoming rates which do not exceed the blanket territory rates, is beyond the power of the Commission under Section 3 of the Interstate Commerce Act.

Paragraph (1) of Section 3 (February 3, 1887, 24 Stat. at L. 379) reads as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

It is to be noted that Section 3 provides that a carrier shall not give any undue preference to any person or locality, or subject any person or locality to any undue prejudice. The Wyoming Railway Company, the appellant, (hereinafter referred to as "the Wyoming") cannot be said to have given any such preference or occasioned any such prejudices. Buffalo and Ucross are served only by the Wyoming and the Wyoming does not serve any other points in the blanket territory (Map Rec. *Seq.* 154). The Wyoming was not a party to any joint rate or rates to other points in the blanket territory (Rec. 4) but treated all shipments moved by it in the same way,

that is, it added its local to the rate to Clearmont (Rec. 4), which was the blanket rate. Moreover, these were inbound shipments of lumber and lumber products originating on other roads.

This point was passed upon in the case of *St. Louis, etc., Ry. Co.* v. *U. S.*, 217 Fed. 80, where at page 83 Judge Baker says:

> "Against neither of the complainants in this case was there evidence before the Commission which could legally support a charge of discrimination on its part. * * * How can any one discriminate against another whom he does not serve and with whom he does not come in contact? We believe that, as a matter of law, the charge of discrimination cannot be brought by a locality against any railroad that does not serve that locality, either directly by its own route or by a joint agreement with other railroads for a through route and a joint rate."

Again in the recent case of *Central Railroad Co. of N. J.* v. *U. S.*, 257 U. S. 66, L. Ed. 91, known as the creosoting in transit case, the Court says:

> "What Congress sought to prevent by that section, as originally enacted, *was not difference between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same carrier or carriers.* Neither the Transportation Act of 1920 nor any earlier amendatory legislation has changed in this respect the purpose or scope of Section 3." (Italics ours.)

As has been pointed out, the Wyoming does not discriminate between any of the persons or localities involved in this case, for it serves only Buffalo and Ucross. The other points are served by other carriers and the Wyoming does not reach them nor participate in through shipments or in joint rates to them.

The *Central Railroad Co. of N. J. case, supra,* involved an appeal from a suit brought in the Federal Court to

enjoin the enforcement of an order of the Interstate Commerce Commission on the ground that it exceeded the powers of the Commission and was arbitrary and void. The plaintiffs were the Central Railroad of New Jersey, the Pennsylvania and twenty-one other railroads. The order of the Commission was upon a petition of the American Creosoting Co., to which the plaintiffs were respondents. It appeared that the petitioner had a creosoting plant at Newark, New Jersey, served by the Central and the Pennsylvania. These carriers failed to establish the privilege known as creosoting in transit. It was claimed that this failure was in violation of Section 1 of the Act to Regulate Commerce and also in violation of Section 3. The Commission found that failure to establish this transit privilege was not unjust or unreasonable and denied relief under Section 1, but it found that the failure amounted to unjust discrimination under Section 3 and granted relief. The District Court denied the application for a preliminary injunction and on appeal this was reversed.

In its opinion this Court stated that the creosoting privilege was granted by certain roads in other states, each acting independently, and that joint rates were made by the respondents, including the creosoting privilege, on the lines of other carriers. The appellants did not participate in any way in establishing the transit privileges, but appellants did join in establishing joint rates over routes which passed through the points at which this privilege prevailed.

The order of the Commission declared that the twenty-three carriers, in so far as they participated in tariffs carrying joint rates through Newark, subjected the American Creosoting Co. to undue prejudice and disadvantage, and it directs these twenty-three carriers to avoid this undue prejudice without prescribing how the discrimination shall be removed.

The Court says in reaching its decision:

> "As to administrative orders operating *in futuro* the Commission's findings of fact are conclusive, subject to qualifications here not pertinent; and the finding that the discrimination is unjust is ordinarily a finding of fact. But the question presented here is whether the discrimination found can be held in law to be attributable to the appellants and whether they can be required to cancel existing joint rates unless it is removed. No finding made by the Commission can prevent the review of such questions."

Again, the Court says:

> "Discrimination may, of course, be practiced by a combination of connecting carriers, as well as by an individual railroad; and the Commission has ample power under Section 3 to remove discriminations so practiced. But participation merely in joint rates does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination only if every carrier has participated in some way in that which causes the unjust discrimination; as where a lower joint rate is given to one locality than to another similarly situated. If this were not so the legality or illegality of a carrier's practice would depend not on its own act but on the acts of its connecting carriers. If that rule should prevail, only uniformity in local privileges and practices, or the cancellation of all point rates, could afford to carriers the assurance that they were not in some way violating the provisions of Section 3. What Congress sought to prevent by that section, as originally enacted, was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same carrier or carriers. Neither the Transportation Act of 1920 nor any earlier amendatory legislation has changed in this respect the purpose or scope of Section 3."

In addition to holding that to constitute a violation of Section 3 a carrier must itself be a party to the unjust

discrimination, the Court indicates that the localities must be similarly situated, a point which is considered hereafter.

The decision in the *Central Railroad case, supra,* cites the case of *East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission,* 181 U. S. 1. This case arose on the complaint of the Board of Trade of Chattanooga, it being asserted by the commercial interest of that city that the carriers in making rates from eastern territory to Chattanooga discriminated against that city in favor of Nashville; that the traffic moved to Nashville through Chattanooga when it moved over certain southern lines, and that under the long and short haul clause (Section 4 of the Act) it was in violation of law for the carriers to apply lower rates to Nashville, a more distant point, than to Chattanooga, a near-by point. The facts showed that the rates to Nashville from this eastern territory were controlled by carriers operating over the northern route through Cincinnati to Nashville. The L. & N. did not reach Chattanooga and had no interest in that traffic. It was conceded that the action of the southern carriers in serving Chattanooga and applying lower rates to Nashville than to Chattanooga did not violate the long and short haul clause as it stood then. It was argued, however, by the Chattanooga shippers that under Section 3 it was unlawful for the southern carriers to apply lower rates to Nashville than to Chattanooga. Mr. Justice White, in discussing this, uses the following language, at page 18:

> "In a supposed case when, in the first instance, upon an issue as to the violation of the 4th section of the Act, it is conceded or established that the rates charged to the shorter distanced point are just and reasonable in and of themselves and it is also shown that the lesser rate charged for the longer haul is not wholly unremunerative and has been

> forced upon the carriers by competition at the longer distanced point, it must result that a discrimination springing alone from a disparity of rates cannot be held, in legal effect, to be the voluntary act of the different carriers, and as a consequence the provisions of the 3d section of the Act, forbidding the making or giving of an undue or unreasonable preference or advantage will not apply."

Applying this test it is seen that the rate made to Sheridan, Birds and other points included in the blanket rate territory are beyond the control of the Wyoming, as shipments to these points did not move over the line of the Wyoming.

From the wording of Section 3 and the decisions it is clear that in order to constitute a violation of the prohibition of the section, a carrier must be responsible for unjust discrimination and undue prejudice and must be involved in making and maintaining the rates which constitute the alleged discrimination or prejudice.

It is submitted that the Wyoming does come within this rule. It only serves the points on its line and does not serve, either directly or as a connecting carrier, the other points in the blanket territory.

As a result the Commission exceeded its powers in finding undue prejudice and ordering the establishment and maintenance to Buffalo and Ucross of rates which do not exceed the rates contemporaneously maintained by other carriers to other points in the blanket territory.

Turning to the second point of invalidity of the order of the Commission, it is contended that undue prejudice does not exist in this situation.

In order to remove prejudice there must be a showing that the prejudice or disadvantage in question is undue or unreasonable. The decisions in construing Section 3 do not hold that all localities are entitled to the same

rates for the transportation of the same commodities merely because the mileage is the same or substantially the same. From the point of view of shippers this will, of course, be the natural rule. However, the situation and circumstances of the carriers involved must also be considered.

In the case of *Interstate Commerce Commission* v. *Great Western*, 209 U. S. 108, in construing Section 3, Mr. Justice Brewer, at page 119, quotes the following from the case of *Interstate Commerce Commission* v. *Alabama Midland*, 168 U. S. 144:

> "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the Act to Regulate Commerce leaves common carriers as they were at common law—free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits."

As stated in the earlier case of *Interstate Commerce Com.* v. *B. & O.*, 145 U. S. 263, in construing Section 3:

> "In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that any fact which produces an inequality of condition and change of circumstances justifies an inequality of charge."

In passing on the question of preference between localities it was decided in *Interstate Commerce Commission* v. *Cincinnati, etc., R. Co.* 124 Fed. 624, that localities similarly situated in many respects are not necessarily entitled to equality of rates. Here it appeared that the

conditions are such at Norfolk and Richmond, Va., by reason of the large number of carrying lines, both rail and water, which enter such places, and the fact that they are in what is known as the "trunk line territory", as to create a very active competition on shipments from the West, and to justify the making of low rates on such shipments; and the fact that such low rates are made on through shipments from Chicago, St. Louis and East St. Louis by a material reduction from local tariff rates by the connecting lines west of the Ohio River, while substantially the local rates were charged on the same lines on through shipments from the same points to Wilmington, N. C., which is not within the trunk line territory but in the southern territory, and has fewer lines of transportation and less active competition, resulting in higher through rates to the latter place, although the length of haul is substantially the same, does not operate to give the Norfolk and Richmond an undue or unreasonable preference or advantage, or subject Wilmington to an undue or unreasonable prejudice in violation of Section 3.

In the case of *U. S.* v. *B. & O. Ry. Co.*, 231 U. S. 274, it appeared that the Commission had found that the carriers were guilty of discrimination because they paid allowances for lightering sugar from the plant of Arbuckle Bros. within the lighterage limits, while at the same time refusing to pay an allowance for lightering sugar from the Federal Sugar Refining Co. located beyond the lighterage limits. The Court overruled the decision of the Commission and held that there was no evidence in the record of a substantial nature to warrant the finding of the Commission, in view of the fact that conditions and circumstances surrounding the movement from the Federal Sugar Refining Company differ from those surrounding the movements from the plant of Arbuckle Bros.

The case of *Phila. & Reading Ry. Co.* v. *U. S.*, 240 U. S. 334, deals with the following situation:

It appeared that the Commission had made an order that the Philadelphia & Reading was guilty of undue discrimination for the reason that it maintained a rate of $1.35 on cement from Evansville, Pa., to Jersey City. Evansville is a local point on the Reading, and the Reading extends from Evansville to Allentown where it delivers the traffic to some one of its numerous connections. It also appeared that these connecting lines maintained a rate of 80 cents from mills on their rails in the neighborhood of Evansville to Jersey City. However, the Philadelphia & Reading did not participate in this 80-cent rate. The Commission having condemned the $1.35 rate maintained by the Philadelphia & Reading, the Supreme Court set aside its decision, pointing out the fact that the $1.35 rate was not declared unreasonable nor was there any finding as to the unreasonableness, intrinsic or relative, as to the 80-cent rate. The following language appears in the decision at page 341:

> "If a universal rate of $1.35 could not justly be complained of by the locality, certainly it is not discriminated against or unlawfully prejudiced because, failing to agree, most of the carriers have established an 80-cent schedule."

So far as the record discloses, or the Commission finds, the only evidence points definitely to the dissimilarity of situation and condition between points on the Wyoming and other points in the blanket rate territory. The Commission finds that the Wyoming operates a line of some twenty-eight miles, and that Buffalo is nearly 1,000 feet higher than Clearmont. The Commission also finds that the Wyoming incurred in 1918 an operating deficit of $46,408.72 and $24,917.89 in 1919, that no interest has been paid on the bonds of the Wyoming for nearly three

years, that no dividends have ever been paid on its stock, that its officers and directors have received no salary, and that it operates through a sparsely settled country with no present prospect of increased traffic. (Rec. 13, 15.) It also appears that the deficit of $24,917.89 in 1919 was suffered on gross receipts of the Wyoming for that year of $67,537.99, of which lumber and lumber products produced $8,540.22. (Rec. 170, 173.) The population of Buffalo is 1,800, and the population of Ucross is about 100.

It is apparent that Ucross and Buffalo and the shippers located at these points suffer from this condition, but as is stated in the case of *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, at page 46:

> "The law does not attempt to equalize fortunes, opportunities or abilities."

The other places considered by the Commission in reaching its determination of undue prejudice are Sheridan and Clearmont on the main line of the Wyoming, Spearfish and Deadwood on a branch line of the Wyoming, and Birds on the Great Western, and independent line connecting with the Burlington and with the Union Pacific. (Rec. 13, 14.)

The situation at Birds may be eliminated for competitive reasons compel the extension of the blanket rates to Birds, as found by the Commission. (Rec. 16.)

The Commission also speaks of Ulm on the main line of the Burlington, and Casper on a division of the Burlington. (Rec. 15.) All of these points take the blanket rate, but none of them are served by the Wyoming, nor does traffic to them move over the Wyoming, nor does the Wyoming participate in joint rates to them.

The Commission says that:

> "It may be cheaper to perform a given service for equal distances to points on a trunk line or on

its branch lines than to points on an independent line. It is not cheaper for the Burlington to perform the service from Edgemont to Spearfish than for the Wyoming to perform the service from Edgemont to Buffalo. The mileage from Edgemont to Spearfish is over 4.5 times greater than to Buffalo." (Rec. 16.)

There is no evidence in the record as to the cost of service from Edgemont to Spearfish or to any of the points in the blanket territory aside from those on the Wyoming. It follows, therefore, that the Commission had before it no evidence upon which to base a finding of undue prejudice; on the other hand, the evidence tended to show dissimilarity of situation and conditions between the Wyoming and the Burlington.

As was stated by the Commission (Rec. 16):

> "There is no competition between retail lumber dealers situated at considerable distances apart in this extensive blanket territory."

so that the finding of the Commission as to undue prejudice is only based on undue prejudice as between localities.

In finding that neither the combination rates nor the components thereof were or are unreasonable, the Commission considered the situation and necessities of the Wyoming. Under the decisions referred to, in determining whether undue or unreasonable prejudice or disadvantage, as provided by Section 3, exists, consideration must also be given to the situation and circumstances of the Wyoming, and the finding of undue prejudice could only be based, erroneously, on the relation of the shippers at Buffalo and Ucross to the lumber dealers at other points in the blanket territory and not on the relation of the Wyoming to the carriers serving other points in the blanket territory.

As there was no showing of substantially similar conditions of transportation applying to shipments to various points in the blanket territory and to Buffalo and Ucross and as the only evidence in the record tends to demonstrate a difference in condition and circumstances between the points on the Wyoming and other points in the blanket territory, it appears that the finding and order of the Commission is unsupported by evidence and is arbitrary and void.

## III.

**The order of the Interstate Commerce Commission being unlawful and void, the order of the District Court should be reversed.**

It is contended that the order of the Interstate Commerce Commission is unlawful and void, and as a result the District Court erred in overruling and denying the application for a preliminary injunction, in granting the motion to dismiss the bill of complaint and in dismissing the bill of complaint and entering the judgment in favor of the defendants, and that the judgment of the District Court below should be reversed.

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